No. 98-1866

Supreme Court, U.S.
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CLERK

In the

Supreme Court of the United States

PETER DIBIAGIO and LAURA DIBIAGIO, EDMUND T. KARAM and BARBARA KARAM,
Petitioners,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROBERT SHINN, Commissioner of the Department of Environmental Protection,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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Brief of the Respondents In Opposition to Petition

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QUESTIONS PRESENTED

Where petitioners acquired in one deed an improved property containing uplands, a single family home, and riparian land, and subsequently brought an inverse condemnation action after the State denied their application to construct a dock within shellfish habitat, based on pre-existing restrictions:

1. Did the New Jersey Supreme Court properly reject the owners' claim of a compensable taking under the Fifth Amendment because the riparian land was part of a larger, improved property which retained significant value and use?

2. Is a landowner who acquires in one deed improved property that includes uplands and riparian land entitled to compensation for the denial of an application to build a pier on his riparian land within shellfish habitat?

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STATEMENT OF THE CASE

This petition seeks review of the New Jersey Supreme Court's decision that the State did not take the property of petitioners Barbara and Edmund Karam without just compensation when it denied their application to build a dock within shellfish habitat in the Manasquan River. The Karams acquired their riparian land as part of a larger property that also contained uplands and a single family home, at a time when development restrictions based on shellfish habitat already were in effect. While the litigation below was pending, the Karams sold the improved uplands and riparian land to petitioners Peter and Laura DiBiagio for $1.1 million. At all times, the Karams' upland and riparian lots were taxed as a single unit (Pa17). Petitioners' riparian land is public trust property subject to New Jersey's longstanding public trust doctrine.

Despite these facts, petitioners argued that their riparian land constituted a separate and distinct "property" and that a State tidelands grant issued in 1924 to their predecessors in title permitted the unconditional construction of a dock on the riparian, public trust land. The New Jersey Supreme Court rejected these assertions and petitioners' claim of a regulatory taking of the riparian land.

A. STATEMENT OF FACTS

In 1924, the State of New Jersey conveyed 523,681 square feet of tide-flowed land below the mean high water line of the Manasquan River to the owners of the adjacent uplands, Charles and May Schweinert, for $5,301.00 (Pa32).
The State tidelands grant required the Schweinerts to also own the land above mean high water or the riparian land would be forfeited (Pa4 - Pa5).

The grant specified that the riparian land below the bulkhead line could not be used for anything but a pier (Pa33), but when the grant was issued, the State's Waterfront Development Act of 1914 required a permit for the

construction of a pier, dock, or other waterfront development (Pa5). In addition, the tidelands conveyed to the Schweinerts were public trust land over which the State could not waive its regulatory authority (Pa18).

The Schweinerts subdivided their land, but always sold both upland and riparian land to each purchaser. Many of these subsequent owners erected docks, but not on the riparian land ultimately acquired by the Karams (Pa6). In 1987, over 60 years after the tidelands grant was issued to the Schweinerts, the Manasquan River was classified as a "special restricted area" that contained high densities of shellfish suitable for human consumption (Pa6). As a result, the construction of a dock or pier became prohibited, because docks and boats can release toxins which make shellfish unsafe (Pa37; Pa51).

In 1993, petitioners Barbara and Edmund Karam purchased in a single deed an upland lot on the Manasquan River which contained a single family home and an adjacent riparian lot of 30,680 square feet. The riparian lot constituted a small portion of the riparian land conveyed to the Schweinerts 69 years earlier (Pa32). The Karams then applied for a waterfront development permit for a dock, which was denied because of the presence of shellfish habitat. The denial was without prejudice to the right to reapply for a permit in the event of a change in regulations (Pa28).

B. PROCEEDINGS BELOW

The Karams brought an inverse condemnation lawsuit in the State courts, alleging that the denial of their application to construct a dock had effected a taking of their property without compensation under *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992). The trial court ruled that the permit denial had deprived the Karams of all viable use of the State's riparian grant of 1924 (Pa6), but the State Appellate Division reversed. The Appellate Division found

that the "property as a whole" included both the upland and the riparian land, and that the tidelands grant of 1924 did not contain an absolute and perpetual right to construct a dock, free from all legislative and regulatory intervention (Pa18 - Pa20).

The Appellate Division decided that the upland and riparian lands were a single property because in "both law and fact, the properties are inextricably intertwined." (Pa17). The Appellate Division also determined that the Schweinerts never had an absolute right to construct a dock under their 1924 tidelands grant, since construction always was conditioned on the requirement to obtain a permit and the State could not waive its right to regulate tidelands, which are public trust property (Pa20; Pa19). The State Supreme Court affirmed the Appellate Division's decision and denied petitioners' motion for reconsideration.

SUMMARY OF ARGUMENT

This Petition does not present any issue requiring resolution by this Court. This Court previously has held that a regulatory takings analysis must focus on the "parcel as a whole," not on discrete segments of the parcel. The courts below studiously adhered to this principle, and determined based on the totality of the facts and a correct analysis of the State tidelands grant of 1924 that the petitioners owned a single "parcel." This factual determination was completely consistent with many federal and state court decisions resolving disputes over what land constitutes the "parcel as a whole."

Both the federal and state courts have examined a variety of factors to resolve disputes over the "parcel as a whole," including unity of ownership, unity of use, unity of

investment, unity of development plan, and regulatory history. All of these factors weighed in favor of viewing petitioners' contiguous upland and riparian land as a single property, and were considered by the courts below.

The State courts did not rely on any single factor or legal standard to resolve the dispute over what land constituted the "parcel as a whole" or "denominator," but determined that under any of the commonly-used standards, the petitioners owned one property. Thus, this case does not present any issue requiring resolution and would be a singularly inappropriate vehicle to address what factors should be used in a "parcel as a whole" analysis. In fact, an attempt to resolve this issue through this case would come perilously close to issuing an advisory opinion and to reviewing a finding of fact.

In addition, the decision below turned on the State courts' interpretation of a State tidelands grant, State tidelands and property law, and the State's public trust doctrine. This interpretation was necessary because property rights are not derived from the Constitution, but from an independent source such as State law. Since the State courts addressed these underlying issues of State law, this Court should not revisit them under the guise of resolving an issue that has not been presented in this case. Accordingly, the Petition for a Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

In 1993, petitioners Barbara and Edmund Karam acquired in a single deed an improved property containing uplands and riparian land which was always taxed as a single property. At the time, the Manasquan River on which the property was located already was classified as a "special restricted area" based on the presence of shellfish habitat, and numerous State

environmental laws restricting the development of riparian land were in place. In 1995, the State denied petitioners' application to build a dock in the riparian land, based on these pre-existing restrictions. The Karams then filed an inverse condemnation action in State court, and sold their improved uplands and riparian land to petitioners Peter and Laura DiBiagio for $1.1 million.

I. THIS CASE PRESENTS NO ISSUE IN NEED OF RESOLUTION BECAUSE THE PETITIONERS OWNED A SINGLE PROPERTY PURSUANT TO ALL OF THE TESTS COMMONLY USED TO RESOLVE A DISPUTE OVER THE "DENOMINATOR" ISSUE.

This case is a fact-sensitive matter in which the State courts properly determined that a landowner who purchased an improved property containing both uplands and riparian land was not entitled to compensation when the State denied an application to build a pier on the riparian land within shellfish habitat. To reach this decision, the State courts correctly rejected the petitioners' claims that their riparian land was a separate "property" and that the 1924 tidelands grant constituted a perpetual permit to build a dock on the land.

When petitioners Barbara and Edmund Karam purchased their property, and at all times thereafter, it contained a single family home on its uplands portion. In addition, the upland and riparian portions of the property always were taxed as a single unit. The petitioners were not allowed to build a pier on the riparian land because it contained significant numbers of clams, which can become unfit for human consumption if they are exposed to toxins from docks and boats (Pa51; Pa37).

These restrictions were in place when petitioners acquired the property in 1993.

Since the early nineteenth century, New Jersey law has recognized that the public has a common right to take shellfish from tidelands, under the State's longstanding public trust doctrine. See *Arnold v. Mundy*, 6 N.J.L. 1 (1821)(recognizing the right of an alleged "trespasser" to take oysters from riparian land allegedly in private ownership). Moreover, the Manasquan River on which the property is located has contained significant shellfish habitat for many years (Pa39). Based on this fact, a deterioration in the River's water quality prompted federal, State and local officials to institute a program to improve the River's water quality and protect its shellfish. 26 N.J.R. 988 (1994). The Karams bought their property in 1993, but State environmental laws protecting natural resources such as shellfish habitat were enacted in the 1970's, well before that time (Pa19 - Pa20).

The owners' claim for compensation rested on the premise that the riparian land constituted a separate "property" and that the State tidelands grant issued in 1924 to their predecessors in interest contained an unlimited right to build a pier on their riparian land. However, the tidelands grant of 1924 encompassed over 523,000 square feet, much more than the Karams' property, and until the Manasquan River was classified as a "special restricted area," piers were built within the granted area. In addition, the 1924 grant required common ownership of the upland and riparian land or the riparian land would be forfeited, and the grant was subject to the State's 1914 Waterfront Development Law and to its longstanding public trust doctrine.

Both the facts and the law clearly demonstrated that the Karams owned a single property. The 1924 tidelands grant was conveyed to the Schweinerts as the upland owners, and after obtaining the grant, the Schweinerts always conveyed upland and riparian land together. The Karams purchased the

riparian land and improved uplands in a single deed, and the lands always were taxed as a single unit. As the Appellate Division concluded, the right to build a dock was "a mere incident to use of the upland property" and in "both law and fact, the [upland and riparian] properties are inextricably intertwined." (Pa17).

These facts make this a singularly inappropriate vehicle for examining the "property as a whole" or "denominator" issue. This Court has squarely held that a takings analysis must examine the impact of governmental restrictions on the "parcel as a whole," not on discrete segments. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 130-31 (1978); *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993). The courts below studiously followed this holding.

In addition, although federal and state courts sometimes have emphasized different factors to decide what land comprises the "parcel as a whole," these courts have repeatedly viewed contiguous land that is commonly owned as a single "parcel." In addition, both federal and state courts have often found that a single "parcel" exists if the land is contiguous and commonly owned; the uses of each part of the land are interrelated; there is a unified investment; and the contiguous lands under common ownership benefit each other. See John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 Univ. Chi. Law Rev. 1535, 1550-1554 (1994).

All of these factors were present here and formed the basis for the factual determination that the riparian land and improved upland formed a single "property." Thus, the courts below did not focus on a single factor or test to resolve the "denominator" dispute, but decided that under any of the standard criteria, petitioners owned a single property. Given these circumstances, it would be entirely inappropriate to use

this case as a vehicle for establishing a uniform "denominator" test or criteria.

Moreover, in cases involving commonly-owned, contiguous upland and riparian land, courts typically have concluded that the uplands and riparian lands form a single "property." See, e.g., *Forest Properties, Inc. v. United States*, _ F. 3d _ , 1999 Westlaw 311246 (Fed. Cir. 1999); *Palm Beach Isles Associates v. United States*, 42 Fed. Cl. 340 (1998), app. pending. Similarly, in cases involving commonly-owned, contiguous upland and wetlands, courts typically have concluded that the uplands and wetlands form a single "property." See, e.g., *Tabb Lakes Ltd. v. United States*, 10 F. 3d 796 (Fed. Cir. 1993); *Zealy v. City of Waukesha*, 548 N.W. 2d 528 (Wisc. 1996). This approach recognizes that an owner of contiguous uplands and riparian land ordinarily will use the upland to facilitate use of the riparian land for fishing, swimming, or other water-oriented activity. In addition, it prevents an owner of contiguous uplands and riparian land from obtaining a public payment of "just compensation," simply because the government has made a legitimate regulatory distinction between environmentally sensitive land and land that is not environmentally sensitive.

None of the cases cited in the Petition treat commonly-owned, commonly-acquired, contiguous uplands and riparian land as separate properties for the purposes of takings analysis. Thus, petitioners are manufacturing a non-existent conflict to address a non-existent issue. Moreover, the courts below used a multi-factor analysis to resolve the "denominator" dispute, which was fully consistent with the approach used throughout the federal and state courts.

Under a minority approach in takings jurisprudence, property that is sold before the advent of governmental regulation sometimes is considered as a separate parcel from the remaining land that subsequently becomes subject to

regulation. See, e.g., *Loveladies Harbor, Inc. v. United States*, 28 F. 3d 1171 (Fed. Cir. 1994). However, this case did not involve those facts either.

The Karams purchased their uplands and riparian land in one transaction in 1993, after regulations prohibiting the construction of a dock within shellfish habitat already were in place. State environmental laws affecting petitioners' riparian land had been enacted in the 1970's, and under the State's Waterfront Development Law of 1914, a permit always was required to erect a dock. Moreover, the State's public trust doctrine always applied to the riparian land and prevented the State from waiving its regulatory control over it. The State courts used these facts to reject petitioners' claim that the riparian land was a separate property.

Petitioners' lands formed a single "property" under each of the common tests and standard criteria used to resolve the "denominator" issue. Accordingly, it would serve no purpose for this Court to review this case anew, in order to decide what criteria to use. Simply put, this matter does not present the "denominator" issue as an issue requiring resolution. Instead, any attempt to resolve the "denominator" issue within the context of this case would come dangerously close to the rendering of an advisory opinion and to the resolution of a factual dispute.

II. THIS MATTER ALSO WAS RESOLVED ON THE BASIS OF STATE LAW PRINCIPLES WHICH DO NOT WARRANT REVIEW BY THIS COURT.

As this Court previously has determined, takings analysis examines the effect of governmental action on the "parcel as a whole" and does not segment the property into discrete segments. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 130-31 (1978); *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993). Similarly, to determine whether a taking of real property has occurred, a court must examine a property owner's entire bundle of rights in the property. *Andrus v. Allard*, 444 U.S. 51 (1979).

Moreover, "property" is not defined by the Fifth Amendment or the Constitution, but is a function of pre-existing background principles of State law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Thus, to determine whether "property" has been taken and the existent bundle of property rights in a piece of real property, the applicable background principles of State property law must be examined. *Lucas* v. *South Carolina Coastal Commission*, 505 U.S. at 1029; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011-1012 (1984); *Phillips v. Washington Legal Foundation*, __ U.S. __, 118 S. Ct. 1925, 1930-32, 141 L. Ed. 2d 174 (1998).

The resolution of the "parcel" dispute in this case turned in large measure on an examination of New Jersey's public trust doctrine and on interpretation of the tidelands grant of 1924. These were issues of State law that involved unique

State sovereign interests in public trust, tidally-flowed property. See *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892); *Idaho v. Coeur D'Alene Tribe of Idaho*, 521 U.S. 261 (1997); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988); *Shively v. Bowlby*, 152 U.S. 1 (1894); *Martin v. Lessees of Waddell*, 41 U.S. 367 (1842). These State issues should not be revisited by this Court.

Further review by this Court will not be useful in addressing the "denominator" issue on a national level, and will require this Court to examine the uniquely State law issues and State public trust law that applied to petitioners' riparian land. However, this Court already has held that the examination of such issues should occur in the State courts, based on the States' special sovereign interest in public trust, submerged land. *Coeur D'Alene*, *supra*. For this reason as well, it would be entirely inappropriate to examine the "denominator" issue within the context of this case. The Petition for a Writ of Certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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